



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 8 1989

MEMORANDUM

SUBJECT: Attached Revised Guidance Concerning Compliance By Use of Low Solvent Technology in VOC Enforcement Cases

FROM: Terrell E. Hunt *Terrell E. Hunt*
Associate Enforcement Counsel
Air Enforcement Division
John S. Seitz, Director *John S. Seitz*
Stationary Source Compliance Division

TO: Air Management Division Directors
Regions I, III and IX

Air and Waste Management Division Director
Region II

Air, Pesticides and Toxics Management Division
Directors
Regions IV and VI

Air and Radiation Division Director
Region V

Air and Toxics Division Directors
Regions VII, VIII and X

Regional Counsels
Regions I-X

Attached is a memorandum revising existing guidance regarding the terms and conditions under which case development teams may agree to consent decree language affording sources the option to comply by means of Low Solvent Technology ("LST"), where such compliance would not be achieved within the ninety-day period otherwise required in the August 7, 1986 policy on the availability of LST schedules in VOC enforcement cases. This guidance memorandum supersedes a memorandum on this subject issued by AED and SSCD on November 21, 1986.

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Background

On August 7, 1986, the Office of Enforcement and Compliance Monitoring and the Office of Air and Radiation jointly published a policy concerning the availability of schedules for LST in VOC enforcement actions. This policy provided that, provided certain conditions were met, such schedules could be obtained. The policy stated, however, that any such schedule could not allow for final compliance to be achieved later than ninety days after the filing of EPA's enforcement complaint.

On November 21, 1986, recognizing that the environment would be equally served if a source came into compliance by LST prior to the final compliance deadline of an expeditious schedule for add-on controls, though after the ninety-day limit, AED and SSCD distributed guidance clarifying the August 7, 1986 policy. This guidance stated that a consent decree containing a schedule for add-on controls could provide that compliance be achieved by some alternate means prior to the final compliance date for add-on controls. The memo went on to specify, however, that any such decrees could not contain provisions excusing accrued stipulated penalties for missed interim dates in the add-on control schedule, even if the source complied by LST prior to the add-on control schedule end date. This restriction was based on the belief that forgiving interim date stipulated penalties might encourage sources to unrealistically attempt to comply by LST.

Upon further consideration, it appears that the policy of precluding forgiveness of stipulated penalties might be counterproductive in some cases. It is particularly true in the case where a defendant might be capable of complying by LST as quickly or more quickly than by installing add-on controls - although not within a ninety-day period - and where unforgiven stipulated penalties would be very costly. In such circumstances, the source might view litigation as more attractive than signing a consent decree providing for unforgivable interim date stipulated penalties. To avoid forcing costly and environmentally unnecessary litigation in such situations, AED and SSCD have developed the modification to the November 21, 1986 guidance set out in the attached revised guidance.

Revisions

The revised guidance continues the availability of "alternate means" clauses as provided in the memorandum of November 21, 1986. However, a defendant seeking such a clause

must agree to either of two preconditions designed to ensure that the defendant is not embarking on a speculative LST scheme. The defendant may agree to escrow stipulated penalties which accrue for violations of interim milestones in the schedule for add-on controls. In such cases, the decree may provide for the forgiveness of such penalties if the source complies by the schedule end date. Alternatively, the defendant may agree to post an appropriate up-front performance bond in lieu of being subject to interim date stipulated penalties. Should the source comply by LST prior to the end date, the escrowed penalties or the performance bond are returned to the defendant.

This revision does not affect other aspects of the August 7, 1986 policy, which remain in effect.

Attachments (August 7, 1986 Policy and November 21, 1986 Guidance; Revised Guidance)

cc: Air Division Branch Chiefs

ORC Air Branch Chiefs

David Buente, Chief
Environmental Enforcement Section
Department of Justice



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This guidance specifies the terms and conditions under which case development teams may agree to consent decree language affording sources the option of achieving compliance by means of Low Solvent Technology ("LST"), where such compliance would not be achieved within the ninety-day period otherwise required in the August 7, 1986 policy on the availability of LST schedules in VOC enforcement cases. This memorandum supersedes a memorandum on this subject issued by AED and SSCD on November 21, 1986.

Background

On August 7, 1986, the Office of Enforcement and Compliance Monitoring and the Office of Air and Radiation jointly published a policy concerning the availability of schedules for LST in VOC enforcement actions. This policy provided that if certain conditions were met, such schedules could be obtained. The policy provided, however, that any such schedule could not allow for final compliance to be achieved later than ninety days after the filing of EPA's enforcement complaint.

On November 21, 1986, recognizing that the environment would be equally served if a source came into compliance by LST prior to the final compliance deadline of an expeditious schedule for add-on controls, though after the ninety-day limit, AED and SSCD distributed guidance clarifying the August 7, 1986 policy. This guidance provided that a consent decree containing a schedule for add-on controls could provide that compliance could be achieved by some alternate means at an earlier date than the final compliance date for add-ons. The memo went on to specify, however, that any such decrees could not contain provisions excusing accrued stipulated penalties for missed interim dates in the add-on control schedule, even if the source complied by LST prior to the add-on control schedule end date. The reason for this restriction was the belief that holding out the promise that interim date stipulated penalties would be forgiven might unduly encourage sources to attempt to comply by LST.

Upon further consideration, it appears that there are alternatives to precluding forgiveness of stipulated penalties which would equally ensure that defendants proposing to comply by LST in longer than 90 days are not embarking on speculative LST schemes. The revised guidance expressed in this memorandum continues the availability of "alternate means" clauses as provided in the November 21, 1986 memorandum. It requires a defendant seeking inclusion of such a clause in a consent decree to agree to either of two preconditions for ensuring that the defendant is not embarking on a speculative LST scheme, however. The defendant may agree to escrow stipulated penalties which accrue for violations of interim milestones in the schedule for add-on controls. In such cases, the decree may provide for the forgiveness of such penalties if compliance occurs by the schedule end-date. Alternatively, the defendant may agree to post an appropriate up-front performance bond in lieu of being subject to interim date stipulated penalties.

Revised Guidance Concerning the August 7, 1986 Policy on LST Schedules in VOC Enforcement Actions

If during negotiations a source offers to comply by LST as soon as, or sooner than, it would comply pursuant to an expeditious schedule for add-on controls - although not within a ninety day period from the filing of EPA's complaint - and the case team determines that there is an adequate basis for believing that the source can and will so comply, the case team may negotiate a consent decree affording the source the option of complying by LST, provided the following are met:

1. The consent decree must contain a schedule providing for expeditious compliance through the installation of add-on controls. (In keeping with the August 7, 1986 policy on LST schedules, the maximum length of any such schedule will be twelve months from the date of entry of the consent decree.) The decree may provide that compliance may alternatively be accomplished by the use of complying coatings, so long as compliance occurs within the time period specified for compliance by add-on controls.
2. As a precondition for EPA's agreement to such an "alternate means" clause, a defendant must agree to either:
 - A. Escrow, on at least a monthly basis, any stipulated penalties which would accrue for failures to meet interim deadlines specified in the schedule for add-on controls, in which case the decree may provide that such stipulated penalties will be forgiven if the source achieves compliance by the final deadline for complying by add-on controls.

The penalty amounts placed in escrow would be in addition to stipulated penalties for the add-on control schedule end date, which would still be required if the source fails to meet the scheduled final compliance date.

The amount of stipulated penalties for missed add-on control schedule interim dates for sources seeking alternate means clauses pursuant to this guidance shall be determined on a case-by-case basis, depending on such factors as the degree of excess emissions associated with the source's noncompliance, air quality in the affected area, etc., but shall in no case be less than the amounts specified below:

<u>Violator's Net Worth</u>	<u>Minimum Interim Date Stipulated Penalty Amount</u>
Up to \$250,000	\$250/day
\$250,000 to \$1,000,000	\$500/day
\$1,000,001 to \$20,000,000	\$1,000/day
\$20,000,001 to \$50,000,000	\$2,000/day
Over \$50,000,000	\$2,500/day

The case team may demand higher stipulated penalty amounts, and may consider amounts that escalate as the time of violation increases. The team should also consider establishing a timeframe during which the source must place the accruing amounts into escrow, e.g., within fifteen (15) days following the date the penalties accrued.

- B. A defendant may post a third-party performance bond providing for absolute, non-contingent forfeiture of the face amount in the event compliance is not achieved by the add-on control schedule end date. The face amount must be at least equal to the total amount of interim date stipulated penalties which could possibly accrue and have to be escrowed assuming the approach specified in Subsection A, above, were utilized and defendant were to miss all interim schedule dates. Such a bond would be in lieu of stipulated penalties for add-on control schedule interim dates, but would be in addition to stipulated penalties for the add-on control schedule end date, which would still be required.

Example: A defendant with \$5,000,000 net worth desires the option of complying by LST in greater than 90 days. If convinced that defendant can and will so comply, the case development team may agree to the inclusion of a clause affording such an option, providing either:

The defendant agrees to stipulated penalties for the add-on control schedule interim milestones required by the August 7, 1986 policy in the minimum amount of \$1,000 per day. The decree may provide that such penalties will be forgiven if compliance is achieved by the add-on control schedule end date, provided defendant agrees to escrow accrued penalties on at least a monthly basis; or

The defendant agrees to post an up-front performance bond in an amount equal to \$1,000 per day times the number of days between the add-on control schedule's first interim milestone and the schedule end date, such bond to be forfeited if compliance is not achieved by the end date and to be in addition to whatever stipulated penalties are provided for failure to meet the schedule end date.

Attachments (August 7, 1986 and November 21, 1986 Policy Statements)

cc: Air Division Branch Chiefs

ORC Air Branch Chiefs

David Buente, Chief
Environmental Enforcement Section
Department of Justice



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 21 1986

MEMORANDUM

SUBJECT: Early Compliance And Stipulated Penalties in
VOC Enforcement Cases

FROM: John B. Rasnic, Acting Director *John B. Rasnic*
Stationary Source Compliance Division
Office of Air Quality Planning and Standards
Michael S. Alushin *M. S. Alushin*
Associate Enforcement Counsel
Air Enforcement Division

TO: Air Management Division Directors
Regions I, III, V and IX

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In an August 7, 1986 policy issued by Craig Potter and Richard Mays ("Policy on the Availability of LST Schedules In CAA Enforcement Actions"), EPA disallowed any compliance schedules in consent decrees which gave the source more than three months after the filing of the complaint to reach compliance through the application of low solvent technology. Two issues have arisen concerning the application of this policy which we hope to answer below.

First, consent decrees may contain a clause providing for compliance through a means other than add-on controls prior to the compliance date for add-on controls. Such a clause could read "(Source) agrees to attain final compliance by (date of add-on controls) through the following schedule for controls, or by some other means at an earlier date." The language should be general in order to keep EPA from committing itself to a compliance plan other than the add-on control schedule.

Second, even if the source achieves early compliance through low solvent technology, EPA will not forgive stipulated penalties which have been incurred as the result of missed milestones in the schedule for installing add-on controls. However, we will not require stipulated penalties for the milestones which come after the date that the source achieved compliance through low solvent technology. The rationale for this position is that we view the add-on schedule to be the "real" one in these cases, and in order for sources to take that schedule seriously, we need to collect stipulated penalties until the time compliance actually occurs. Including a clause allowing complete forgiveness of stipulated penalties would encourage sources to continue to gamble on the possible success of low-solvent technology, precisely the situation that we hoped to end by issuing the August 7, 1986 policy.

cc: VOC Workgroup Members